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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1959

No. 797

WOOD-MOSAIC COMPANY, - - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

AND

WOOD-MOSAIC CORPORATION, - - Petitioner,

versus

UNITED STATES OF AMERICA, - - Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BERNARD H. BARNETT,
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S. L. GREENEBAUM,
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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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v.

UNITED STATES OF AMERICA, - - *Respondent.*

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that writs of certiorari issue to review the judgment herein of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion and judgment of the Court of Appeals is printed in the Appendix hereto (App. 17). It is reported in 272 Fed. 2d 944. The opinion of the United States District Court for the Western District of Kentucky is printed in the Appendix hereto (App. 17). It is reported in 160 Fed. Supp. 631.

JURISDICTION.

The judgment of the Court of Appeals was entered on December 22, 1959 (App. 17). No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Is Part II of the Excess Profits Tax Act of 1950 elective, or are the petitioners required to compute their excess profits tax credits pursuant to Sections 461 and 462 of Part II of the Act even though the petitioners met all of the requirements necessary to compute their excess profits tax credits pursuant to Sections 435 and 445 of Part I of the Act, and elected so to do?

STATUTES INVOLVED.

Title 26, Section 2.

Excess Profits Tax Act of 1950.

(United States Code Annotated Title 26, Excess Profits Taxes.)

Title 26, Part I, Section 434(a).

Title 26, Part I, Section 435(a), (b), (c).

Title 26, Part I, Section 445(a), (g)(1)(2)(A)-(B)(C)(3), (h)(1)(2).

Title 26, Part II, Section 461(a)(1)(A), (b)(1), (d).

Title 26, Part II, Section 462(g)(3).

The texts of the statutes involved are set forth in the appendix hereto (App. 25 to 30).

STATEMENT.

The petitioner, Wood-Mosaic Company, hereinafter referred to as "New Company", was incorporated under the laws of Kentucky in November of 1947. Shortly after the incorporation of New Company, Wood-Mosaic Corporation, hereinafter referred to as "Old Company", transferred all of its operating assets in the United States to the New Company, in exchange for stock of the New Company.

Old Company was incorporated under the laws of Kentucky in 1907 under the original name of "Wood-Mosaic Company". In November of 1947, its name was changed from "Wood-Mosaic Company" to "Wood-Mosaic Corporation".

In computing the excess profits tax credits pursuant to the Excess Profits Tax Act of 1950, the New Company applied the sections of Part I of the Act which are paraphrased and interpreted below:

Paraphrase of Applicable Provisions of Korean War Excess Profits Tax Act.	Interpretation of Applicable Provisions of Korean War Excess Profits Tax Act.
PART I (ONE).	
"Section 435. Excess Profits Credit—Based on Income.	The excess profits tax credit based on income is provided in Section 435. That section provides the taxpayer's income credit shall be determined from its "base period net income" unless the taxpayer is a "new
"(a) . . . The excess profits credit [of New Company] for . . . [each of the] taxable year[s], computed under . . . [Section 435], shall be—	

PART I (ONE) (Continued)

(1) . . . [Based on its average base period net income] . . . .

* * *

"(c) . . . For the purposes of . . . [determining the excess profits credit—based upon income] the average base period net income of . . . [New Company] shall be the amount determined under subsection (d), . . . [unless New Company is a new corporation within the meaning of Section 445] then the average base period net income shall be the amount determined under either subsection (d) . . . [or under Section 445] whichever results in the lesser . . . [Korean War Excess Profits Tax]."

"Section 445. Average Base Period Net Income — New Corporation.

"(a) . . . [Since New Company] commenced business after . . . [January 1, 1946, it] shall, . . . except as provided in subsection (g), *be considered a new corporation for the purpose of this section,* and its average base period net income shall be the amount computed under subsection (b).

corporation" under Section 445, in which event it is entitled to the credit provided under Section 435 or Section 445, whichever results in the lesser excess profits tax.

New Company is a "new corporation" under Section 445, if it commenced business after the first day of its base period which was January 1, 1946. New Company commenced business on December 1, 1947, which was after the first day of its base period.

PART I (ONE) (Continued)

"(g) Ineligible Corporations.—

(1) If [New Company] . . . , *on or after December 1, 1950,* and prior to . . . [April 30, 1950], acquire[d] any properties . . . (2)(A) [in any acquisition from another corporation of properties in a *non-taxable organization, reorganization, liquidation or capital contribution,* New Company] (1) shall not, for the taxable year in which such acquisition occurs or for succeeding taxable years, be entitled . . . [to be treated as a new corporation under Section 445] except under the circumstances and subject to the limitations provided in Section 462(g)."

However, under Section 445(g), a "new corporation" under Section 445 is not entitled to be treated as a "new corporation" if it acquires property in a non-taxable organization, reorganization, liquidation or capital contribution (see Section 445(g)(2)(A)) *on or after December 1, 1950* and prior to the end of its third taxable year, except to the extenf provided in Section 462(g).

On December 1, 1947, New Company acquired the manufacturing facilities and operating assets from the Old Company in exchange for the stock of New Company. This exchange constituted a non-taxable reorganization .

Since the acquisition by New Company from Old Company occurred *prior to December 1, 1950,* the limitations prescribed by Section 445(g) are inapplicable and New Company is entitled to be treated as a "new corporation" under Section 445(a).

The Government contends the sections of Part II of the Act which are paraphrased and explained below are *mandatory* and *not elective* and, therefore, the petitioners are not entitled to rely upon the relief provisions of Part I of the Act.

Paraphrase of Applicable Provisions of Korean War Excess Profits Tax Act.	**Interpretation of Applicable Provisions of Korean War Excess Profits Tax Act.**
PART II (TWO).	
"Section 461 . . . "(a) . . . (1) . . . [New Company is an 'acquiring corporation' since it] acquired— (A) Substantially all the properties of . . . [Old Company] and the whole . . . consideration for the transfer of such properties . . . [was] the transfer to . . . [Old Company] of all of the stock of all classes . . . of [New Company; all of which constituted a *non-taxable corporate reorganization*] . . . • • • "(d) [Since New Company is an 'acquiring corporation',] [f]or purposes of Section . . . 445 . . . [New Company] which is an acquiring corporation shall be considered to have been in existence and to have had taxable years for any period	The Government contends that New Corporation is an "acquiring corporation" under Section 461(a) since it acquired all of the properties of Old Company in a *non-taxable reorganization*. The Government further contends that since New Company is an "acquiring corporation" and since Section 461(a) is applicable irrespective of the date of acquisition and because the company from which it acquired its assets (Old Company) has been in business since 1907, New Company is not a "new corporation" under Section 445, by reason of the application of Section 461(d).

PART II (TWO) (Continued).

during which it . . . was in existence, and . . . [New Company] shall be considered to have commenced business . . . . [in 1907, when the Old Company commenced business.]"	(Old Company elected to compute its excess profits tax credit pursuant to Section 435, of Part I.)

Both of the petitioners and the Government agree that:

(1) If the petitioners are entitled to use Part I (Sections 435 and 445), then the petitioners made elections allowable to them and computed their tax credit and their taxes correctly. The base period of the "New Company" is January 1, 1946.

(2) If the petitioners are not entitled to use Part I (Sections 435 and 445), but are required to use Part II (Sections 461 and 462), then the Government's calculation of the excess profits tax credit and the applications of Part II are correct.

(3) If the petitioners are entitled to use Part I (Sections 435 and 445), then New Company is "entitled to be treated as a new corporation." This is true because New Company came into existence prior to December 1950, and after the first day of its base period, and received assets for stock.

(4) If the petitioners are required to use Part II (Sections 461 and 462), then New Company is "an acquiring corporation", since it acquired the assets of the Old Company in 1947, the assets being exchanged for stock, and Old Company is a "component corporation."

(5) These cases present no factual issues.

The petitioners filed with the District Director of Internal Revenue for the District of Kentucky timely U. S. corporation income and excess profits tax returns for their fiscal years 1951, 1952 and 1953, and paid the corporate income and excess profits taxes as computed on said returns.

On March 29, 1956, the Commissioner of Internal Revenue notified the "New Company" that a determination had been made of deficiencies in income and excess profits taxes for its fiscal year ended April 30, 1951, in the sum of $118,613.00, and for its fiscal year ended April 30, 1952, in the sum of $34,861.44.

On March 29, 1956, the Commissioner of Internal Revenue notified the "Old Company" that deficiencies had been determined in its income and excess profits taxes for its fiscal year ended April 30, 1952, in the sum of $20,640.15, and for its fiscal year ended April 30, 1953, in the sum of $27,066.53.

The deficiencies and the interest thereon were paid by the petitioners to the District Director of Internal Revenue for the District of Kentucky. Both petitioners timely filed their respective claims for a refund of the deficiencies in corporate income and excess profits taxes. The claims for refund were officially disallowed, and the separate claims for refund of interest were ignored for more than six months by the Commissioner. Actions in the United States District Court for the recovery of the deficiencies paid were duly filed by both petitioners.

PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF KENTUCKY.

The United States District Court for the Western District of Kentucky substantially sustained the Commissioner as to the disallowance of those portions of the claims for refund which related to the recovery of the deficiencies assessed pursuant to the Commissioner's determination that Part II of the Excess Profits Tax Act of 1950 was mandatory. The District Court held the petitioner, New Company, could not consider itself a new corporation under the provisions of Section 445 of Part I, since it was also an acquiring corporation within the meaning of Sections 461 and 462 of Part II. Furthermore, the District Court held the petitioner, Old Company, could not compute its base period earning experience under the provisions of Section 435 of Part I because it was also a component corporation within the meaning of Section 461 of Part II.

PROCEEDINGS IN THE COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners duly and timely appealed to the Circuit Court of Appeals for the Sixth Circuit on the question of whether Part II of the Excess Profits Tax Act of 1950 was mandatory or whether the petitioners, who met the requirements of Sections 435 and 445 of Part I of the Excess Profits Tax Act of 1950, were entitled to

elect to compute their excess profits tax credits under the aforesaid sections of Part I.

The Court of Appeals affirmed the District Court in the following per curiam order:

> "The above cause coming on to be heard upon the record, the briefs of the parties and the arguments of counsel in open court, and the court being duly advised;
>
> "Now, therefore, it is ordered, adjudged and decreed that the judgment of the District Court be, and is hereby affirmed on the findings of fact and conclusions of law in the opinion of Judge Shelbourne, reported in 160 Fed. Supp. 631."

REASONS FOR GRANTING THE WRITS.

The Decisions Below Are in Direct Conflict With the Rule of Statutory Interpretation Applied by This Court in a Long Line of Decisions and With the Rule Applied by the Court of Appeals for the Fifth Circuit in Interpreting the Excess Profits Tax Act of 1950.

The cardinal rule of interpreting Federal Statutes is to give effect to every clause and word of the statute and not to emasculate any part of it.

The rule of statutory interpretation, violated by the Sixth Circuit, is stated in *United States* v. *Menasche*, 348 U. S. 528, 538, 539, where this Court, in a unanimous decision interpreting a naturalization statute, said:

> "The Government's contention that Section 405(a) does not apply to any phase in the processing of naturalization petitions would defeat and

destroy the plain meaning of that section. 'The cardinal principle of statutory construction is to save and not to destroy.' N. L. R. B. v. Jones & L. Steel Corp., 301 U. S. 1, 30, 81 L. Ed. 893, 907, 57 S. Ct. 615, 108 A. L. R. 1352. It is our duty 'to give effect, if possible, to every clause and word of a statute', Montclair v. Ramsdell, 107 U. S. 147, 152, 27 L. Ed. 431, 433, 2 S. Ct. 391; rather than to emasculate an entire section, as the Government's interpretation requires. * * *"

The rule of statutory interpretation violated by the Sixth Circuit was also stated by this Court in *Cox* v. *Roth*, 348 U. S. 207, 209, where the Court, in a unanimous opinion interpreting the Jones Act, said:

"* * * As the Court said in Markham v. Cabell, 326 U. S. 404, 409, 90 L. Ed. 165, 168, 66 S. Ct. 193, 'The policy as well as the letter of the law is a guide to decision. Resort to the policy of a law may be had to ameliorate its seeming harshness or to qualify its apparent absolutes. * * * The process of interpretation also misses its high function if a strict reading of a law results in the emasculation or deletion of a provision which a less literal reading would preserve'."

Mr. Justice Frankfurter stated the rule in his dissenting opinion in *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 298. Justice Frankfurter wrote:

"We need not agree with a legislative judgment in order to obey a legislative command. It is enough for us that Congress did not legislate idly, but did intend the loss-of-status provision to

have an effect. 'We are not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word. As early as in Bacon's Abridgment, sect. 2, it was said that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." This rule has been repeated innumerable times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each.' Washington Market Co. v. Hoffman, 101 U. S. 112, 115, 116, 25 L. Ed. 782-784. * * *"

The Sixth Circuit and the District Court each held Part II of the Excess Profits Tax Act of 1950 to be mandatory and not elective, and in so doing ignored and in effect deleted and emasculated, Section 445(g)-(2) (A) of Part I of the Act.

The petitioner, New Company, met all of the requirements of Section 445(g)(2)(A) of Part I of the Act. Petitioner, New Company, is thus entitled to be treated "as a new corporation" under Section 445(a) because it acquired the property of Old Company in a tax free exchange for stock prior to 1950 and prior to the end of its third taxable year. The Sixth Circuit per curiam order affirming the District Court erroneously held that petitioner, New Company, was required to compute its excess profits tax credit under Section 461 of Part II of the Act solely because the petitioner,

New Company, was also an acquiring corporation as defined by Section 461 of Part II of the Act.

The Sixth Circuit erroneously held the petitioner, Old Company, was not entitled to compute its excess profits tax credit under Section 435 of Part I solely because the corporation was also a component corporation within the meaning of Section 461 of Part II.

Section 461 of Part II of the Act includes all transactions described in Section 445 of Part I of the Act irrespective of whether the transactions took place prior to December 1950 or subsequent thereto. Section 461 of Part II is all inclusive and cannot be reconciled with Section 445 of Part I *unless the interpretation urged by the petitioners is adopted.* It is only by declaring Part II (Sections 461 and 462) elective that the provisions of Part I (Section 445) can be given effect. The sections (461 and 462 of Part II and 445 of Part I) are irreconcilable *if Part II of the Act is mandatory.*

The interpretation of the Excess Profits Tax Act of 1950 made by the Court of Appeals herein is in direct conflict with the rule of statutory interpretation followed by the Circuit Court of Appeals for the Fifth Circuit in interpreting the Excess Profits Tax Act of 1950 in the case of *Phinney* v. *Tuboscope Co.*, 268 Fed. 2d 233. The Fifth Circuit refused to interpret the Act in a way which would require a certain provision of Section 445 of Part I to "have no meaning."

Certiorari Should Be Granted Because the Issue Decided By the Court of Appeals Is of Wide Application.

The petition for writs of certiorari should be granted because the determination of whether Part II of the Excess Profits Tax Act of 1950 is elective or mandatory is essential in interpreting this important tax act and the relief provisions thereof. The decision is broader in scope than the particular facts presented in this case. The determination of whether Part II is elective or mandatory affects all corporations, partnerships or proprietorships which were reorganized in a tax free exchange of stock for assets prior to December 1, 1950 and were in business before December 31, 1947. The petitioners cannot state how many claims involving the statutory interpretation of Part II of the Act are pending. It is reasonable to assume that there are many cases pending in courts and cases in the negotiation stage within the administrative divisions of the Internal Revenue Service. The question is thus one of broad principle.

Certiorari Should Be Granted Because the Decision of the Sixth Circuit Is So Erroneous as to Work an Injustice on the Petitioners.

The provisions of the statute under discussion are relief provisions. The District Court and the Court of Appeals, in erroneously interpreting Part II of the Act as being mandatory, have prevented the petitioners from enjoying the benefit of the relief provisions intended by Congress. This Court has always held that

taxing statutes should, in cases of doubt, be construed most strongly against the Government. In *Gould* v. *Gould*, 245 U. S. 151, this Court said:

> "In the interpretation of statutes levying taxes it is the established rule not to extend their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out. In case of doubt they are construed most strongly against the government, and in favor of the citizen. U. S. v. Wigglesworth, 2 Story, 369; American Net and Twine Co. v. Worthington, 141 U. S. 469; Benziger v. United States, 192 U. S. 38."

The Sixth Circuit and the District Court have so far departed from the basic rule and cardinal principle of statutory interpretation as to challenge basic principles which are too fundamental to the law to be destroyed or ignored in even one case.

The petitioners have suffered, because the two lower courts, by the simple device of ignoring one set of definitions in a statute, and applying another, have evaded the question which the cases present squarely. The petitioner, New Company is admittedly qualified under Section 445 to be treated as a "new corporation", yet it is denied this right by the Courts ignoring Section 445 and attaching to the New Company the definition of an "acquiring corporation" set out in Section 462 of Part II of the Act.

The respondent has never asserted that Section 445 is inapplicable nor has either of the lower courts so held. Those courts have simply ignored that section of the Act.

This Court cannot be primarily concerned with the amount of money involved in a single case, however, the petitioners have been deprived of approximately Two Hundred Thousand Dollars ($200,000.00) as the result of a clear error on the part of the Sixth Circuit, which cursorily affirmed the District Court, who admittedly found the problem presented to be "difficult." This loss results in tremendous hardship and injustice to the petitioners.

The petitioners are not requesting certiorari be granted because of mere error in the lower courts. (If this was a ground for certiorari, then the true function of this Court would be defeated.) Petitioners contend, however, the error of the Sixth Circuit is so great and represents such a substantial departure from the cardinal rule of general statutory interpretation and the basic rule of interpretation of relief provisions of taxing statutes as to require this Court to review the principles involved and to settle an important legal problem.

CONCLUSION.

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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